

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

**LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 265,**

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Case No. 9-CD-116000

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*Charged Party,*

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and

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**HENKELS & MCCOY, INC.,**

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*Employer/Charging Party,*

**POST-HEARING BRIEF**

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**OF LABORERS' LOCAL 265**

and

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**INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 18, DISTRICT 4/5,**

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*Party-In-Interest.*

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**STATEMENT OF THE CASE**

This matter is before the Board under Section 10(k) of the National Labor Relations Act ("the Act"). Henkels & McCoy, Inc. ("Henkels") filed an unfair labor practice charge on October 30, 2013 alleging that Laborers' International Union of North America, Local 265 ("Laborers") violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with the object of forcing or requiring Henkels to assign certain work to employees represented by the Laborers rather than employees represented by International Union of Operating

Engineers, Local 18 (“Operating Engineers”). A hearing was conducted before Hearing Officer Tamilyn A. Thompson on Thursday, December 19, 2013.

Although all the parties could not stipulate to the work in dispute, the record demonstrates that the work in dispute is the operation of mini excavators and skid steers on the Henkels’ service crews working on Duke Energy gas service lines in the Cincinnati, Ohio area (“the Project”). (Tr. 12-13, 93.) The Project will continue through June 2015. (Tr. 24, 35.) Importantly, as demonstrated below, Henkels has a clear preference in making an assignment of the disputed work to its workers represented by the Laborers. Moreover, the collective bargaining agreements, past practice, industry and area practice, economy and efficiency of operations, and relative skills and training, when weighed and considered with Henkels’ clear preference, favor an award of the disputed work to workers represented by the Laborers.

## **I. JURISDICTION**

The parties have stipulated that Henkels is an employer engaged in commerce within the meaning Section 2(6), (7) of the Act. (Tr. 11.) Further, the parties stipulated that the Laborers is a labor organization within the meaning of Section 2(5) of the Act. (Tr. 12.) Although it likely was just an oversight, the parties did not discuss stipulating that Operating Engineers is a labor organization with the meaning of Section 2(5) of the Act. However, the record clearly demonstrates that it is, (Jt. Ex. 1; Tr. 387-88), and the Board has so found in several other cases. *E.g., Laborers’ Local 894 (Donley’s)*, 360 NLRB No. 20, slip op. at 1 (Jan. 10, 2014); *Laborers’ Local 860 (McNally/Kiewit)*, 359 NLRB No. 89, slip op. at 1 (Apr. 8, 2013); *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 1 (2010).

## II. THE DISPUTE

### A. *Factual Background*

#### 1. Description of the Service Work

Henkels is a nationwide company engaged in utility construction including gas line work. (Tr. 20.) The company is divided into three regions: East, Central, and Western. (Tr. 166.) Henkels performs the most gas line work in its Eastern region, and it only uses two-person crews consisting of either two laborers or one laborer and one pipefitter. (Tr. 166-67.) Henkels Vice President and Director of Labor Relations Steve Freind testified that these two-person service crews are “never comprised of operating engineers.” (Tr. 166.)

Focusing on the Project at issue in this dispute, Mark Maxwell, who is area manager over 13 states for Henkels and manager of the Project, testified that there are two components: first, the installation of mainline gas lines and, second, the installation of services as part of the accelerated main replacement renewal and extension project. (Tr. 20-21.) Only the second component—i.e., the service work—is at issue in this proceeding. (Tr. 21, 24.) Mr. Maxwell briefly described the service work as follows:

The service work involves renewing and replacing services that extend from the curb line to the residence or business. There's an excavation made. A new line is sometimes trenched in, bored in, or perhaps inserted in existing casing. The lines installed would be tested, and then the subscriber's appliances --furnaces, boilers, things of that nature -- would be relit. And when we left it, they'd back in service on a new line rather than the existing line when we arrived.

(Tr. 22.) To perform this work, the worker first must locate the gas line and dig a hole with a mini excavator to expose it. (Tr. 67-68.) As the mini excavator digs the hole, another worker “spots” him with a shovel to ensure the mini excavator does not hit the gas line. (Tr. 68.) A portion of the old line is removed. (Tr. 71.) Then, a worker will enter the home

to disassemble the existing meter and to prepare to install a plastic line, i.e., service insertion, in the old steel gas line. (Tr. 69-71.) The service insertion and the newly installed line from the curb are pressure tested and fused together. (Tr. 72.) Duke Energy requires all workers that fuse the lines to receive specialized training. (Tr. 72-73.)

Henkels, just as it does throughout its entire Eastern region, currently utilizes two-person crews to complete the service work on the Project. (Tr. 22-24.) The Henkels workers on these two-person crews utilize both mini-excavators, (CP Ex. 2), and skid steers, (CP Ex. 3), to complete the service work on the Project. (Tr. 22-24.) Henkels' employees use mini excavators to excavate pits needed to renew service to a customer and, sometimes, to backfill the same pit. (Tr. 32.) Skid steers are used to haul sand or granular materials, to compact, and to restore the land after the gas lines are installed. (Tr. 23.) Currently, as is typical in its Eastern region, the crews on the Project are made up of one Laborer and one member of the Pipefitters Union. (Tr. 24-25.)

It is industry practice to assign mini excavators and skid steers to members of the Laborers. (Tr. 35, 165-66.) In fact, all of Henkels competitors for Duke Energy service work—namely, AMS, RLA, KS Energy, and Premier Energy—use members of the Laborers to perform service work with mini excavators and skid steers. (Jt. Ex. 3; Tr. 30-31, 38, 229-30.) Prior to May 2013, Henkels' crews consisted of one Operating Engineer, one Laborer, and one Pipefitter. (Tr. 25.) Henkels, among other things, made the adjustment from a three-person to two-person crew to lower costs so it could secure more Duke Energy service work, which is competitively bid. (Tr. 26, 159, 212-13.) On cross-examination, Mr. Maxwell testified:

Q: Do you know what prompted [Henkels] to have this decision about taking operating engineers off the service crews?

A: **Yes, I do.**

Q: What?

A: **To be more competitive. We weren't making money, and we weren't getting work.**

(Tr. 102.) This adjustment in crew size assisted Henkels in reducing costs because the Operating Engineer on a three-person crew would only work a small fraction of the day.<sup>1</sup>

(Tr. 78-79, 102-03.) Importantly, prior to this change, both Laborers and Operating Engineers used mini excavators and skid steers on service work for 12 years, neither to the exclusion of the other. (Tr. 152, 159, 193, 230, 293.) But by assigning all the service work to a Laborer and Pipefitter, Henkels reduced its costs and became more competitive in obtaining Duke Energy work. (Tr. 25-26, 151.)

2. Operating Engineers Claim All the Service Work Performed by Members of the Laborers

a. *Past Job-Site Visits*

Operating Engineers field representatives began visiting the Project and “shutting [Henkels’] crews down because there [were] not operators on the mini excavators.” (Tr. 336.) Operating Engineers field representatives Nate Brice and Jeff Powell, on several occasions, approached Laborer Scott Brown while he was operating a mini excavator on the Project. (Tr. 338-41.) Within six months of the instant charge being filed, Brice told Laborer Scott Brown that the Operating Engineers needed to process grievances because there was no Operating Engineer on the mini excavator. (Tr. 339.) Such occurrences were

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<sup>1</sup> In fact, on a two-person crew, the Laborer using the mini excavator spends more time in a day off the machine than on it. (Tr. 231.)

commonplace, as Powell, a year or so earlier, told Laborer Scott Brown that he was not allowed on the mini excavator. (Tr. 341, 344.) At that time, Mr. Powell stated that only operators could run the mini excavator. (Tr. 344.) On one occasion, Mr. Powell even shut down the Project, instructing Henkels' supervisory staff that no one will operate the mini excavator until an Operating Engineer arrives from the hiring hall or else the Operating Engineers would take pictures the entire time. (Tr. 342.) This was part of a pattern and practice over the last six or seven years of the Operating Engineers' field representatives claiming the work in dispute. (Tr. 131-132.)

b. *Recent Grievances & Meetings*

In addition to the jobsite visits and discussions with a worker represented by the Laborers, Operating Engineers' representatives demanded the mini excavator and skid steer work through written grievances and during a June 14, 2013 meeting with Henkels officials. (Int. Ex. 8; Tr. 128, 132, 137-38, 141-42, 182.) During what Henkels Project Manager Maxwell considered "the most unprofessional meeting [he'd] ever attended" and a "clown show," (Tr. 133), Operating Engineers' representatives aggressively demanded the skid steer and mini excavator work on the Project. (Tr. 134, 197.) The Operating Engineers' representatives wanted their members to perform the disputed work on the Project. (Tr. 138-39, 197.) And because the members of the Operating Engineers did not receive the work, Operating Engineers' counsel confirmed their position as follows: "We are proceeding forward with a grievance alleging that Henkels & McCoy has violated our collective bargaining agreement by assigning the operation of skid steers and mini excavators to someone other than an operating engineer." (Tr. 139.) Operating Engineers' field representative Brice confirmed that his union is seeking damages in lieu of the

reassignment of work. (Tr. 372.) He stated: "I'm requesting damages. That's what it was about. Damage from payment for somebody else doing the work." (*Id.*)

3. Laborers Claim the Work and Threaten Picketing and Work Stoppages

On July 29, 2013, Steve Freind, Vice President and Director of Labor Relations for Henkels, sent the Laborers a letter stating that mini excavator and skid steer work would be assigned to members of the Operating Engineers to avoid an arbitration. (CP Ex. 6; Tr. 236.) Mr. Freind sent the letter to the Laborers because the Operating Engineers had requested to advance the grievances to arbitration. (CP Ex. 8, 203-04.) After determining Freind's threat to be legitimate, Laborers' field representative Justin Phillips sent a letter to Henkels claiming the mini excavator and skid steer work and threatening to picket and to strike in the event the disputed work was assigned to members of the Operating Engineers. (CP Ex. 7; Tr. 193, 237.) Phillips advised Freind as follows:

It has come to our attention that your Company has reassigned mini-excavator and skid steer work to employees represented by the International Union of Operating Engineers, Local 18. However, as you acknowledge in your July 29, 2013 correspondence to me, that work was previously assigned to your company's employees represented by Laborers' Local 265. This work falls within our agreement and has been traditionally assigned to and performed by Laborers.

You are advised that Local 265 will not, under any circumstances, disclaim this work. Further, you are advised that, in the event your company assigns this work to members of IUOE Local 18 as you indicate it will do in your July 29, 2013 correspondence, Local 265 will take any and all actions necessary to preserve our work, including but not limited to, picketing and work stoppages on the Project.

(CP Ex. 7.) In response, Henkels filed an unfair labor practice charge against the Laborers.

## ***B. Applicability of the Statute***

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(ii)(D) has been violated. This standard requires finding there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees, *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); (2) a party has used proscribed means to enforce its claim to the work in dispute, *see, e.g., Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004); and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute, *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138-1139 (2005).

### **1. There Are Competing Claims for the Work**

Both the Laborers and the Operating Engineers claim the mini excavator and skid steer work on the Project. Importantly, the Operating Engineers, through its counsel, made its claim for damages abundantly clear at the hearing and even refused to disclaim the work during the hearing. (Tr. 14-15.) *See Electrical Workers Local 71 (Capital Electric Line Builders, Inc.)*, 355 NLRB No. 24, slip op. at 3 (Apr. 16, 2010) (treating new statements made on the record at the 10(k) hearing to constitute a claim for work). It is undisputed that the Operating Engineers' field representatives filed pay-in-lieu grievances concerning the disputed work on the Project, which are considered claims for the work. *Laborers' Local 894 (Donley's)*, 360 NLRB No. 20, slip op. at 4 (Jan. 10, 2014) (citing *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010) (finding that a pay-in-lieu grievance constitutes a competing claim for work); *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993), *enfg.* 307 NLRB 1429



(1992) (noting that the attempted distinction “between seeking the work and seeking payment for the work is ephemeral”)). Moreover, the Operating Engineers’ field representatives approached at least one member of the Laborers on the Project, telling him that Laborers were not allowed on the equipment and grievances would be filed. Notably, the Operating Engineers demanded, during grievance discussions with Henkels’ officials on June 14, 2013, that the mini excavator and skid steer work be assigned to members of the Operating Engineers. Finally, the Laborers claimed the work, as indicated in Phillips’ August 9, 2013 letter. Thus, both the Operating Engineers and the Laborers claim the disputed work.

## 2. Laborers’ Local 265 Engaged in Proscribed Activity

The Laborers, through its August 9, 2013 letter, threatened picketing and work stoppages in the event the disputed work was assigned to members of the Operating Engineers. Further, the Operating Engineers, through its counsel, made statements about picketing twice at the hearing. First, he stated “We’ll find out” after an objection was sustained concerning his questioning about whether the Operating Engineers could legally picket Henkels on a whim. (Tr. 191.) Second, he replied, “Picket,” when the Laborers’ counsel questioned what the Operating Engineers would do if it seriously claimed it had no pending contract at all with Henkels. (Tr. 273-74.) *See Electrical Workers Local 71 (Capital Electric Line Builders, Inc.)*, 355 NLRB No. 24, slip op. at 3 (Apr. 16, 2010) (considering new, previously undisclosed statements made on the record at the 10(k) hearing as evidence).

To be sure, section 8(b)(4)(D) of the Act provides that it is an unfair labor practice to encourage individuals to engage in a strike, or to threaten, coerce, or restrain any person engaged in commerce, where an object thereof is “forcing or requiring any employer to

assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . .” Moreover, “[a] threat to strike and picket to force or require an employer to reassign disputed work constitutes reasonable cause to believe Section 8(b)(4)(D) has been violated.” *Laborers’ International Union of North America, Local 76 (Albin Carlson Co.)*, 286 NLRB 698, 699-700 (1987). “A charged party’s use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe Section 8(b)(4)(D) has been violated.” *IBEW Local 71 (Thompson Electric)*, 354 NLRB No. 46, p. 4 (2009). There was no affirmative evidence at the hearing that the Laborers’ threat to picket was a sham or result of collusion. *Operating Engineers Local 150 (R&D Thiel)*, 340 NLRB 1137, 1140 (2005) (citing *Laborers’ Indiana District Council (E&B Paving)*, 340 NLRB 150 (2003)).

First, the fact that Phillips had not received authority to strike at the time he sent his letter is not affirmative evidence of a sham. *Lancaster Typographical Union No. 70 (CJS Lancaster)*, 325 NLRB 449, 451 n.8. Nor is the fact that Mr. Phillips sent an email requesting consistency in Henkels’ assignment of work to his members in May 2013.<sup>2</sup> *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). There is no affirmative evidence that Henkels convinced the Laborers to send the August 9, 2013 letter. And Mr. Freind’s statement referencing a 10(k) during the June 14, 2013 meeting with the Operating Engineers is not evidence of a sham or collusion with the Laborers, but rather a statement of his past experience in the construction industry when two unions are claiming the same work. (Tr. 200.) He observed: “[W]elcome to the world of a union contractor,

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<sup>2</sup> When he sent the May 2013 email, Phillips testified he was not anticipating a jurisdictional dispute. (Tr. 248.)

especially in times when economics are bad, you're going to get whipsawed. And one or the other is going to make a threat to you or even worse, without making a threat, show up on a job action.” (*Id.*) Notably, there was no evidence of any discussion between the Laborers and Henkels regarding collusion. Thus, the Board should find that there is reasonable cause to believe that the Laborers engaged in proscribed activity.

3. There Is No Method for Voluntary Adjustment of the Dispute

The parties stipulated that there is no method for the voluntary adjustment of this dispute between the parties. (Tr. 15.) As such, it is appropriate for the Board to determine the dispute under Section 10(k) of the Act.

4. The Operating Engineers’ Work-Preservation Defense Fails Because It Is Attempting to Acquire More Work for Its Members at Henkels

It is undisputed that members of the Laborers and members of the Operating Engineers have both used mini excavators and skid steers in the past for Henkels and that neither group has exclusively performed the work. (Tr. 152, 159, 193, 230, 293.) The Board has repeatedly rejected a work-preservation defense under this exact scenario. *E.g., Teamsters Local 20 (Midwest Terminals, Inc.)*, 359 NLRB No. 107, slip op. at 2 (Apr. 30, 2013). It is well established that where “[t]he record establishes that both [groups of] employees have a long history of performing portions of this work [and] neither group has performed the work exclusively,” a union’s objective is, regardless of statements to the contrary, “work acquisition” and “the Board will resolve the dispute through a 10(k) proceeding.” *Id.* (citing *Electrical Workers IBEW Local 48 (ICTSI Oregon, Inc.)*, 358 NLRB No. 102, slip op. at 3 (2012); *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 545 (2004)). Thus, the Operating Engineers’ work-preservation defense should be rejected forthwith.

### III. THE MERITS OF THE DISPUTE

If the jurisdictional prerequisites have been met, Section 10(k) requires the Board to make an affirmative award of the disputed work to one of the groups of employees involved in the dispute. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 579 (1961). While the Act does not set out the standards the Board is to apply in making this determination, the Supreme Court has explained that “[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.” *Id.* at 583. Consistent with the Court's opinion, the Board announced in *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962), that, in making the determination that the Supreme Court found was required by Section 10(k), the Board would consider “all relevant factors,” and that its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *See generally Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20, slip op. at 4 (2003). Overall, the applicable factors overwhelmingly favor awarding the work to members represented by Laborers’ Local 265.

#### A. *Board Certifications and Collective Bargaining Agreements*

The parties stipulated that there are no Board certifications at issue in this case. (Tr. 13-14.) According to *Machinists Lodge 1743 (J. A. Jones Construction)*, one of the factors to consider in making the determination as to which craft should be assigned the work is the existence and terms of any agreements between the employer and the crafts. In this case, the Operating Engineers, during the hearing, took the odd position that there is no pending collective bargaining agreement with Henkels. If the Board accepts the Operating

Engineers' position as true, the fact that the Laborers do have an executed agreement with Henkels favors an award of the work to the Laborers. *See Electrical Workers Local 71 (Capital Electric Line Builders, Inc.)*, 355 NLRB No. 24, slip op. at 4 (Apr. 16, 2010) (finding the absence of an agreement with one union favors an award to the other union).

Even if the Operating Engineers have a pending agreement with Henkels, the agreements specifically favor the assignment of work to the Laborers. Although the words "skid steer" and "excavator" appear only in the Operating Engineers' agreement,<sup>3</sup> a specific description of the work in dispute appears only in the Laborers' agreement. In this regard, the Laborers' agreement covers "all gas distribution work." (CP Ex. 4, Art. I, Sec. B.) Directly on point with the disputed work as described herein, the Laborers' agreement covers:

1. "the digging and trimming of trenches and ditches for utility lines"
2. "work in connection with the distribution of pipe and skids and placing of such skids and pipe over the trench"
3. "the work in connection with the lowering of the pipe and removal of the skids; in connection with the backfilling of trenches"

(*Id.*) Conversely, the Operating Engineers' agreement simply covers "construction, installation, treating, repair and/or reconditioning of distribution pipeline . . ." (Intervener Ex. 4.) Thus, the Laborers' agreement specifically covers all the work in dispute, rather than just generally describing the work in a broad sense, like the Operating Engineers'

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<sup>3</sup> Notably, these words only appear in the wage rate section of the Operating Engineers' agreement. (Intervener Ex. 4, p. 15.)

agreement.<sup>4</sup> Thus, the language of the agreements favors an award of the work to the members of the Laborers.

**B. Both Prior and Ongoing Employer Practices Favor the Laborers**

From when it started working in the Cincinnati area in 2001 until now, Henkels always used members of the Laborers to perform the disputed work. From at least 2003, Henkels preferred to assign the work in dispute to members of the Laborers. Henkels' Area Supervisor Eversole testified:

Q. Mr. Eversole, when you began with Henkels & McCoy, as supervising crews in 2003 until the present, did Henkels & McCoy also utilize laborers to operate mini excavators and skid steers in service crew work?

A. **Absolutely. We preferred the laborers to operate because most of the guys that we brought down were guys that had been working for me and had been operating that equipment, and the operators that we got out of the hall could not operate either one most of the time, 90 percent of the time.**

(Tr. 331.) Until 2013, it also used members of the Operating Engineers to perform the work in dispute. The record demonstrates that Henkels used Operating Engineers to avoid grievances and disruptions of work, essentially under the threat of work stoppages and labor unrest.<sup>5</sup> Currently, members of the Laborers are performing all the disputed work. Because Henkels' prior practice of assigning some of the disputed work to the Operating

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<sup>4</sup> It is anticipated that the Operating Engineers will argue that its agreement clearly covers the work in dispute. Even where the Board has determined that one union's contract clearly covers work, it has not awarded disputed work to the members of those unions. *Laborers Local 368*, 305 NLRB 607, 608 (1991).

<sup>5</sup> The Board has attached little weight to a past assignment to one union over another where the assignment was made under the threat of economic sanctions. *Cf. Sheet Metal Workers' International Association, Local Union No. 19 (E.P. Donnelly, Inc.)*, 345 NLRB 960 (2005). Further, even where there is evidence that the Employer has used a composite crew in the past, the Employer's future preference should prevail. *Laborers' International Union of North America, Local 373 (Reicher Building Co.)*, 223 NLRB 1014 (1976).

Engineers was influenced heavily by threatened work stoppages and because the current practice is to assign all the disputed work to members of the Laborers, the evidence favors an award of the work to members of the Laborers.

***C. Henkels' Preference Favors the Laborers***

Henkels' witnesses confirmed that it prefers to assign all the disputed work to members of the Laborers. Henkels' Project Manager Maxwell testified:

Q. And what is Henkels & McCoy's preference as to which union operates the mini excavator and the skid steer on the service crews for Duke Energy?

A. **We prefer the laborers.**

Further, Area Supervisor Eversole confirmed:

Q. And is it your preference, as an area supervisor, to have members of Local 265 operate skid steers and mini excavators on service lines?

A. **Absolutely.**

(Tr. 332.) Thus, the Employer's preference favors an award of the work to members of the Laborers.

***D. Both the Skills and Training to Perform the Work Favor the Laborers***

It is undisputed that members represented by the Laborers have the skills to operate the mini excavator and skid steer. (Tr. 32-34, 37.) They also possess the requisite training—classwork and/or on-the-job training—to operate the mini excavator and skid steer. (Tr. 231-33.) It is undisputed that the Operating Engineers offer training on skid steers and excavators, but Henkels' Area Supervisor Eversole stated that 90% of the time, an Operating Engineer from the hiring hall could not operate the skid steer or mini excavator, (Tr. 331), forcing Henkels to reject these workers and call for a new ones. (Tr.

306-07.) Thus, this factor weighs in favor of an award of the work to members of the Laborers.

***E. Both Efficiency and Economy of Operations Favor the Laborers***

Henkels competes with several other union companies for the Duke Energy service work. All its competitors use Laborers to perform the work in dispute. Obviously, in order to bid competitively and complete work in a timely manner, Henkels prefers to assign the work to members of the Laborers. Henkels' management indicated that the members of the Laborers are capable of performing more of the tasks associated with the service work. Moreover, Henkels' management testified Henkels received better work product from members of the Laborers performing the disputed work. In fact, members of the Operating Engineers have refused associated work assignments off the equipment, which results in lost productivity. Thus, the economy and efficiency of operations favor an award of the work to the members of the Laborers.

***F. Both Area and Industry Practice Favor the Laborers***

While it is true that members of the Operating Engineers do operate this equipment, it is industry practice to assign mini excavators and skid steers to Laborers on *service work*. In fact, all of Henkels' competitors for Duke Energy service work—namely, AMS, RLA, KS Energy, and Premier Energy—use members of the Laborers to perform service work with mini excavators and skid steers. Thus, both the area and industry practice favor an award of the disputed work to members of the Laborers.

**IV. CONCLUSION**

For the foregoing reasons, the Board should award the work in dispute to the workers represented by the Laborers.



*Dated January 23, 2014 at the City of Cincinnati, Hamilton County, Ohio.*

Respectfully submitted,

MANGANO LAW OFFICES CO., L.P.A.

s/Ryan K. Hymore

Basil W. Mangano (0066827)

2245 Warrensville Center Rd., Suite 213

Cleveland, Ohio 44118

T: (216) 397-5844/F: (216) 397-5845

bmangano@bmanganolaw.com

- and -

Ryan K. Hymore (0080750)

3805 Edwards Road, Suite 550

Cincinnati, Ohio 45209

T: (513) 255-5888/ F: (216) 397-5845

rkhymore@bmanganolaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing brief was served this 23d day of January 2014 via the NLRB's electronic filing system upon the following:

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And electronic mail upon the following:

Timothy R. Fadel, Esq.  
Wuliger Fadel & Beyer  
The Brownell Building  
1340 Sumner Court  
Cleveland, Ohio 44115  
tfadel@wfblaw.com

*Counsel for the Party-In-Interest IUOE Local 18*

- and -

Doreen S. Davis, Esq.  
Jones Day  
222 East 41st Street  
New York, NY 10017-6702  
ddavis@JONESDAY.COM

*Counsel for the Charging Party Employer*

s/Ryan K. Hymore

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